BLANK
PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~850~~ 45

RONALD R. CICHOS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. DILLON
Attorney General,
State of Indiana
CHARLES S. WHITE
Chief Counsel—Staff
Attorneys for Respondent.

Office of the Attorney General
219 State House
Indianapolis, Indiana

C. E. Pauley & Co., Inc., Indianapolis

BLANK
PAGE

INDEX

COURT RULES CITED

CASES CITED

STATUTES CITED

BLANK
PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 850

RONALD R. CICHOS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The petitioner has made no attempt to comply with Rule No. 23, 1(c), of the rules of the Supreme Court of the United States insofar as it requires that the question pre-

sented for review be "expressed in the terms and circumstances of the case." Not only has he stated a completely abstract question, but, moreover, an unintelligible question.[1]

It is only by reading petitioner's argument (under the heading "Reasons for Granting Writ," pp. 12-23) that one can understand that the question he is attempting to present to the Court for decision is this:

> Whether the double jeopardy clause of the Fifth Amendment is incorporated in the due process clause of the Fourteenth Amendment and, if so, whether the petitioner has been denied due process by the Indiana Supreme Court's affirmance of his conviction on a verdict of guilty of the offense of reckless homicide at a second trial on a two count affidavit charging reckless homicide in Count I and involuntary manslaughter in Count II on identical allegations of fact, an identical verdict having been rendered in his first trial on the same two counts, and the new trial having been granted on his motion.

---

[1] The sole question stated is this: "1. Is the Constitutional right against double jeopardy guaranteed by the Fifth Amendment of such basic characteristic in the law so as to be immune from statute encroachment under the Fourteenth Amendment?" (Pet. p. 2).

SUMMARY OF ARGUMENT

1. The question of whether petitioner was ever in double jeopardy was mooted when the second trial's jury rendered a verdict identical to the first verdict set aside by the granting of petitioner's own motion for new trial.

2. The two offenses, reckless homicide and involuntary manslaughter, for which petitioner was twice tried on a two count affidavit are, in reality, one offense with alternative penalties. Petitioner's situation was exactly the same as that of a defendant charged in one count with one offense punishable by alternative penalties. It was, therefore, not double jeopardy to subject him, on the second trial, to the hazard of the more severe penalty which had been eliminated by the first verdict.

3. It is not an arbitrary rule of law applicable alike to all situations and to all multi-count indictments, that silence of the trial jury as to one count is equivalent to a verdict of not guilty on that count. It is only where logic permits and necessity requires that silence is so treated. When there is no need to presume any verdict at all, or when it would result in an inconsistency, silence is not tantamount to a verdict of not guilty.

4. An accusatory pleading charging two or more offenses consisting of different elements (whether in one count or two counts) is essential to the application of the double jeopardy rule in *Green v. United States,* 355 U.S. 184.

5. All the reasons stated in *Palko v. Connecticut,* 302 U.S. 319, for not considering the double jeopardy clause of the Fifth Amendment a part of the due process clause of the Fourteenth Amendment are reasons for not granting certiorari herein.

ARGUMENT

Respondent has rephrased, "in the terms and circumstances of the case," petitioner's "Question Presented," not only to make it intelligible, but also to emphasize that the case at bar is not a *Green* case.[2] The whole thrust of the petition herein is that petitioner's second trial violated the rule against double jeopardy enunciated in *Green*, which rule, he urges, should now be applied to the States by the overruling of *Palko v. Connecticut*, 302 U.S. 319.

Green was tried for first degree murder in the District of Columbia and found guilty of second degree murder. He appealed and the conviction was reversed. On the second trial he was found guilty of first degree murder. He again appealed and when the case reached this Court it was held that the first verdict was "an implicit acquittal on the charge of first degree murder."[3] Or " . . . that Green's jeopardy for first degree murder came to an end when the jury was discharged. . . ."[4] His appeal of the verdict of guilty of second degree murder was held not to constitute a waiver of that jeopardy[5] and his second trial for first degree murder was held to be contrary to the Fifth Amendment and the conviction was reversed.[6]

In the case at bar the petitioner was tried on a second amended affidavit in two counts alleging identical facts of a fatal automobile collision. Count I charges the offense of reckless homicide and Count II charges the offense of

---

[2] *Green v. United States*, 355 U.S. 184.
[3] 355 U.S. at 190.
[4] 355 U.S. at 191.
[5] 355 U.S. at 191.
[6] 355 U.S. at 198.

involuntary manslaughter.[7] The jury's verdict was guilty on Count I (reckless homicide) and silent as to Count II (involuntary manslaughter). A new trial was granted on appeal and an identical verdict reached on the second trial, i.e., guilty on Count I and silent as to Count II.[8]

If it was putting petitioner in double jeopardy to try him a second time on the charge of involuntary manslaughter, such error was rendered harmless when petitioner was not found guilty of that charge on the second trial. The question, then, of whether the second trial was double jeopardy is moot.

That this Court will not decide moot questions probably needs no citation of authority and certainly needs no argument. But because a hasty reading of the Indiana Supreme Court's opinion, especially its somewhat confusing dicta, may suggest that its affirmance of petitioner's conviction rests on its decision that the Fifth Amendment's prohibition of double jeopardy is not a part of the due process required of the States by the Fourteenth Amendment, respondent cites *Oil Workers Union v. Missouri*, 361 U.S. 363, as authority that this Court will not review a State supreme court's decision of a moot question.

Notwithstanding the fact that the Indiana Supreme Court's opinion states that "[a]ppellant urges that the trial court committed reversible error by permitting the state to prosecute him a second time for either involuntary manslaughter or reckless homicide,"[9] respondent does not understand that petitioner is here asserting that retrial on

---

[7] Petition, p. 2; Petition's Appendix, pp. 16-21.
[8] Ibid.
[9] Appendix to Petition, p. 2.

the reckless homicide charge was double jeopardy, or that such a contention was ever properly before the Supreme Court of Indiana for decision. His statement of the record clearly shows that the only double jeopardy error he assigned in the Indiana Supreme Court relates solely to his retrial on the involuntary manslaughter charge. In his "Statement" he contends that the question of former jeopardy under the United States Constitution was presented to the trial court by 1) his special plea[10] and the State's demurrer[11] thereto, 2) the fifth reason in his motion for directed verdict at the conclusion of the State's evidence[12] and the peremptory instruction No. B[13] tendered therewith, and 3) the fifth reason of his motion for directed verdict at the conclusion of all the evidence[14] and the peremptory instruction No. B[15] tendered therewith. All of these documents contend that the petitioner cannot be tried the second time on Count II's charge of involuntary manslaughter (although neither says that such second trial violates the United States Constitution), but none of them contend that the second trial on the charge of reckless homicide was error. The sustaining of the demurrer to the special plea of former jeopardy as to Count II, and the overruling of the two motions for directed verdicts, were the only specifications of error with respect to contentions of former jeopardy which petitioner made in his motion for new trial.[16] The overruling of the motion for new trial

---

[10] Quoted on pp. 3-6 of his Petition.

[11] Petition's Appendix, pp. 21-22.

[12] Quoted on pp. 6-7 of his Petition.

[13] Petition's Appendix, p. 25.

[14] Quoted on page 7 of his Petition.

[15] Petition's Appendix, p. 27.

[16] Petition's Appendix, pp. 30-43, specifications 2 (p. 30), 6 (p. 35) and 7 (p. 36). Petitioner claims no more. See last sentence of page 7 of Petition and quotations from motion for new trial which follow on pp. 8 and 9.

was the only error assigned in his appeal to the Indiana Supreme Court.[17] Therefore, the only double jeopardy question which petitioner claims to have brought to the Supreme Court of Indiana is whether his second trial for involuntary manslaughter violates the Fourteenth Amendment.[18] And that question has been mooted by the second verdict.

In doing his best to bring the instant case within one of the categories mentioned in Rule 19, 1(a), as the type of state court decision this Court may consider for review on petition for writ of certiorari, petitioner has made a valiant effort to show that the time is now ripe for overruling the holding of *Palko v. Connecticut,* 302 U.S. 319, that the Fifth Amendment's guarantee against double jeopardy (at least in all its aspects) does not apply to State criminal prosecutions. But even if this Court agrees with that argument and is now ready to overrule *Palko,* it must first find a case in

---

[17] Petition, p. 9; Petition's Appendix, pp. 43-44.

[18] Petitioner says, on page 7 of his Petition, that after the verdict he again raised the double jeopardy question by his Motion in Arrest f Judgment. This motion is printed at pages 28-30 of the Petition's Appendix and does state as a part of ground 3 that entry of judgment on the verdict of guilty to Count I would violate the rule against double jeopardy because of its inconsistency with the prior and simultaneous implied verdicts of not guilty to Count II. The overruling of this motion, however, was not assigned as error, either independently or by inclusion in the subsequent motion for new trial. Whether failure to assign error based on this contention was due to the fact that it is not a statutory ground for motion in arrest of judgment (Burns IND. STAT. ANN., § 9-2001) or was due to the absurdity of the idea that silence as to Count II implies a not guilty finding which should outweigh an express verdict of guilty on Count I (assuming that guilt on I and innocence on II is inconsistent) or was due to some other reason, is immaterial. It was not assigned as error and no question was ever before the Indiana Supreme Court, and consequently no question is here presented to this Court, as to whether it was double jeopardy (and a denial of due process?) to try petitioner the second time on Count I (reckless homicide).

which a defendant has been convicted in violation of some federal rule against double jeopardy. Petitioner realizes as much and that is the reason he is contending the case at bar violates the rule in *Green*. Respondent has already shown that if the retrial did violate that rule, the error was mooted by the jury's verdict in that second trial. Respondent will now show that the retrial did not violate the rule announced in *Green* and could not be the vehicle for extending *Green* to state court prosecutions in any event.

All similarities between this case and the *Green* case are purely superficial and entirely unreal, as will be shown by petitioner's own arguments.

Respondent fully agrees with petitioner's repeated statements that the two offenses, reckless homicide and involuntary manslaughter, as here charged, are identical,[19] save for difference in penalty. Respondent also agrees that the Supreme Court of Indiana so held in its decision which petitioner here seeks to reverse.[20] And that is the very reason (aside from the rule of *Palko* and the fact that petitioner was never convicted on Count II, involuntary manslaughter) that we do not have here a state court decision of a federal question of substance.

The 1881 and 1905 statutory definitions of manslaughter, both voluntary and involuntary, in Indiana, were said to be, word for word, Blackstone's definition of the common law crime of manslaughter and at least since 1905 the pen-

---

[19] This statement is found, in substance, on pages 14, 15, 16 and 22 of the Petition. Obviously, of course, identity exists only in cases where the offenses are committed by vehicle.

[20] Petition, p. 15.

alty has been imprisonment for 2 to 21 years.[21] The present 1941 statute[22] varies slightly from Blackstone's definition,[23] and still carries a penalty of 2 to 21 years. The first and only reckless homicide statute was enacted in 1939 as a part of one section, § 52, ch. 48, Acts of 1939 (Burns IND. STAT. ANN. § 47-2001) given by § 169 (Burns IND. STAT. ANN. § 47-2313) the short title "Uniform Act Regulating Traffic on Highways."[24]

---

[21] *State v. Dorsey,* 118 Ind. 167, 168 (1889); *Dunville v. State,* 188 Ind. 373, 375.

[22] Burns IND. STAT. ANN. § 10-3405, reads: "Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, or involuntarily in the commission of some unlawful act, is guilty of manslaughter, and on conviction shall be imprisoned not less than two [2] years nor more than twenty-one [21] years."

[23] " 'The unlawful killing of another without malice express or implied; which may be either voluntarily, upon a sudden heat; or involuntarily but in the commission of some unlawful act.' " *State v. Dorsey,* 118 Ind. 167, 168, quoting Blackstone's Commentaries, Book 4, p. 191.

[24] § 52 reads: "(a) Reckless Homicide. Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hundred dollars [$100] or more than one thousand dollars [$1,000], or by imprisonment in the state farm for a determinate period of not less than sixty [60] days and not more than six [6] months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars [$1,000] and imprisonment in the state prison for an indeterminate period of not less than one [1] year or more than five [5] years.

"(b) Driving While Under the Influence of Intoxicating Liquor or Narcotic Drugs. Any person who drives a vehicle while such person is under the influence of intoxicating liquor or of narcotic drugs shall be guilty of a criminal offense. Upon a first conviction, such person shall be punished by a fine of not less than ten dollars [$10.00] nor more than one hundred dollars [$100] or by imprisonment in the county jail or state farm for a determinate period of not less than ten [10] days nor more than six [6] months, or by both such fine and imprisonment. Upon a second or subsequent conviction, such person shall be punished by a fine of not more than one hundred dollars [$100] and imprisonment in the state farm for a determinate period of not more than one [1] year, or by a fine of not more than five hundred dollars [$500] and imprison-

Since no records of committee discussion or floor debate are kept by the Indiana General Assembly, and committee reports are devoid of explanation or other detail, there is no authoritative key to the Legislature's purpose in 1939 in creating a second identical offense when "the unlawful killing of another without malice express or implied . . . [was done] involuntarily in the commission of . . . [the] unlawful act"[25] of "driv[ing] a vehicle with reckless dis-

---

ment in the state prison for an indeterminate period of not less than one [1] year or more than three [3] years.

"(c) Reckless Driving. Any person who drives a vehicle with reckless disregard for the safety, property or rights of others shall be guilty of the offense of reckless driving. Any person convicted of reckless driving shall be punished by a fine of not less than one dollar [$1.00] nor more than fifty dollars [$50.00], or by imprisonment in the county jail or state farm for a determinate period of not less than ten [10] days nor more than six [6] months, or by both such fine and such imprisonment.

"The offense of reckless driving, as defined in this section, may be based, depending upon the circumstances, on the following enumerated acts and also on other acts which are not here enumerated, but are not excluded and may be within the definition of the offense: (1) driving at such an unreasonably high rate of speed, or at such an unreasonably low rate of speed, under the circumstances, as to endanger the safety or the property of others, or as to block the proper flow of traffic; (2) passing or attempting to pass another vehicle from the rear while on a slope or on a curve where vision ahead is obstructed for a distance of less than five hundred [500] feet ahead; (3) driving in and out of a line of traffic, except as permitted elsewhere in the laws of this state; (4) speeding up or refusing to give half of the roadway to a driver overtaking and desiring to pass; (5) failing to dim bright or blinding lights when meeting another vehicle or pedestrian; (6) driving recklessly against another person or against the car or other property of another; or driving in any other specified manner in which the driver is heedless of probable injury to the safety, the property or the rights of others."

[25] The quoted words are from Blackstone's definition of manslaughter quoted *supra* in full in note 23. In 1939 Indiana's manslaughter statute read as follows: "Whoever unlawfully kills any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter, and, on conviction, shall be imprisoned in the state prison not less than two years, nor more than twenty-one years." (Acts, 1905, ch. 169, § 351.)

regard for the safety of others,"[26] except such as may be apparent on the face of the Act. That the Legislature was aware, however, that the new offense of reckless homicide was identical to the already existing offense of involuntary manslaughter (when committed by driving a vehicle) is made plain by the provisions of § 53 (Burns IND. STAT. ANN. § 47-2002) which reads as follows:

> "Provisions for Proceedings Under Sec. 52. All proceedings under Sec. 52 of this act shall be subject to the following provisions:
>
> "(1) Each of the three offenses defined in this section is a distinct offense. No one of them includes another, or is included in another one of them. Sec. 52, subsection (a), in creating the offense of reckless homicide, does not modify, amend or repeal any existing law, but is supplementary thereto and to the other sections of this act. All three of the offenses, or any two of them, may be joined in separate counts in the same indictment or affidavit. One or more of them may be joined in separate counts with other counts alleging offenses not defined in this section, such as involuntary manslaughter, if the same act, transaction or occurrence was the basis for each of the offenses alleged. With respect to the offenses of reckless homicide and involuntary manslaughter, a final judgment of conviction of one of them shall be a bar to a prosecution for the other; or if they are joined in separate counts of the same indictment or affidavit, and if

---

In 1941, the 1905 Act was replaced by the statute in effect at the time of the vehicular collision for which petitioner was prosecuted, which new Act is set out in full in note 22, *supra*. Again, we see no reason for the slight change in wording which appears to have changed the meaning not at all.

[26] These last quoted words are the "unlawful act" of the reckless homicide statute. See *State v. Beckman*, 219 Ind. 176, 182, 37 N.E. 2d 531, 533, discussed infra at p. 12.

there is a conviction for both offenses, a penalty shall be imposed for one offense only."

The only logical deduction of legislative intent to be drawn from the provisions of § 53 (Burns § 47-2002), as they apply to involuntary manslaughter and reckless homicide by vehicle, is that the 1939 Legislature wanted to provide, by the enactment of the reckless homicide provisions of § 52 (Burns § 47-2001) more flexibility in the punishment which might be meted out to those who kill by the unlawful act of recklessly driving a vehicle.[27]

It may be conceded, *arguendo,* that the Indiana Supreme Court may not avoid the double jeopardy question merely by holding reckless homicide and involuntary manslaughter by vehicle to be identical offenses if they are not truly identical. The Indiana cases cited by petitioner on pages 14 and 15 of his petition, however, clearly show that Indiana has always interpreted its reckless homicide statute as requiring for conviction of that offense, the same proof of the same ultimate facts as are essential to a conviction of involuntary manslaughter by vehicle.

Shortly after it was enacted, the reckless homicide statute was challenged in *State v. Beckman,* 219 Ind. 176, 37 N.E. 2d 531 (1941) on the ground that the offense was not described by the statute with sufficient certainty. Acknowledging that public offenses must be so described so that

---

[27] Indiana's indeterminate sentence law, Ind. Acts of 1929, ch. 200, Burns IND. STAT. ANN., §§ 9-1819 through 9-1821, renders the 2 to 21 years penalty prescribed in the manslaughter statute an inflexible penalty of 21 years, so far as the prosecutor, grand jury, petit jury, and judge are concerned. If an executed sentence is imposed, it must be for 2-21 years imprisonment and only the parole authorities decide how much of it, in excess of the minimum, must be served in prison.

people may know in advance whether what they are about to do or fail to do is criminal, the court held such requirement to be met " 'if the legislature uses words having a common-law meaning or a meaning made definite by statutory definition or previous statutory construction. . . .' " It then said:

> "It is clear that the statute does not fall in that class where the Legislature may be said to have bodily adopted the common-law definition of a crime, such as sometimes results from the use of such terms as 'arson,' 'adultery,' 'bigamy,' 'larceny,' etc. But it does not follow that the phrase 'reckless disregard for the safety of others' did not have a definite meaning at common law. It was said in *State v. Dorsey* (1889), 118 Ind. 167, 168, 169, 20 N.E. 777, 778, 10 Am.St.Rep. 111, 112, 113:
>
> > " 'The common law definition of manslaughter, as given by Blackstone, is as follows: "The unlawful killing of another without malice express or implied; which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act."
> >
> > " '. . . To constitute manslaughter the act causing death must be of such a character as to show a wanton or reckless disregard of the rights and safety of others, but not necessarily an act denounced by the statute as a specific crime.'
>
> Our involuntary manslaughter statute follows the common-law definition of manslaughter, § 10-3405, Burns' 1933, § 2408, Baldwin's 1934. It will thus be seen that the statutory definition of reckless homicide is as specific in its descriptive terms as that defining involuntary manslaughter. Indeed, as a matter of statutory definition, the former is more certain than the latter, since 'reckless disregard for the safety of others' is more restricted in its mean-

ing than an 'unlawful act,' although the terms may be judicially interpreted as meaning the same things in particular statutes.

"In *Smith v. State* (1917), 186 Ind. 252, 259, 115 N.E. 943, 946, the indictment charged that the defendant unlawfully drove a motor vehicle over a public street in a reckless and wanton manner, without regard for the safety of others, and at a high and reckless rate of speed. The court said:

> " 'This count of the indictment charges appellant with gross carelessness in the operation of his automobile and is clearly sufficient under the rule that a negligent act which shows a wanton and reckless disregard for the rights and safety of others, and which causes the death of another, will constitute manslaughter.'

"In *Minardo v. State* (1933), 204 Ind. 422, 429, 430, 183 N.E. 548, 550, 551, the defendant was charged with having driven an automobile at a greater rate of speed than was permitted by law, and also at a speed 'greater than was reasonable and prudent having regard to the traffic and the use of said highway then and there existing, and which said rate of speed was then and there such as to endanger the life and limb of any person using said highway.' The court said:

> " 'In our opinion the charge is not limited to the alleged violation of the speed limit statute, but it especially covers the driving of an automobile under circumstances showing a willful and reckless disregard for the life and limb of other persons. The traffic on the road; the driving experience of appellant; whether or not the three seated in the car interfered with the driver's control thereof; the position of the car at the time of the collision with reference to the center of the road; the weight of the car, the condition of its

brakes and the effectiveness of its headlights were evidentiary circumstances proper to be considered in determining the essential fact of whether or not appellant was guilty of wanton and reckless driving. . . .'

"The case of *Armstrong v. Binzer* (1936), 102 Ind. App. 497, 504, 506, 507, 199 N.E. 863, 865, 867, involved the meaning of the words 'reckless disregard of the rights of others,' found in a statute relating to civil liability growing out of the operation of an automobile. The Appellate Court said:

" 'The statute does not attempt to define the meaning of the phrase "reckless disregard of the rights of others," but does, by such phrase, fix a standard of conduct which, if not observed, will result in liability for damages sustained, without, however, undertaking to apply that standard to any given state of facts, thus leaving the question as to what constitutes a reckless disregard of the rights of others open for determination as a question of fact when the evidence is conflicting, or when the evidence is conflicting, or when different inferences from the evidence may be reasonably drawn.'

The following instruction was approved as a correct statement of the law:

" ' ". . . It is proper, therefore, for the court to define the term 'reckless disregard of the rights of others.'

" ' "Reckless disregard of the rights of others, as used in the Indiana Guest Statute, means where the owner or operator of an automobile voluntarily does an improper or wrongful act, or with knowledge of existing conditions, voluntarily refrains from doing a proper and prudent act, under circumstances when his action, or his

failure to act, evinces an entire abandonment of any care, and a heedless indifference to results which may follow, and he recklessly takes the chance of an accident happening without intent that an accident may occur.'' '

There was a petition to transfer, based on the ground that the above opinion erroneously decided a new question of law, which this court denied prior to the enactment of chapter 48, Acts of 1939, and it is proper to presume that the General Assembly had that fact in mind when the statute here under consideration was enacted.

"It is our view that the part of the statutory definition of reckless homicide which makes it unlawful to driver a motor vehicle with reckless disregard for the safety of others is sufficiently definite to describe a public offense, and in this conclusion we are supported by the following cases from other jurisdictions: *State v. Sheaffer* (1917), 96 Ohio St. 215, 117 N.E. 220, L.R.A. 1918 B 945 Ann. Cas. 1918 E 1137; *People v. Green* (1938), 368 Ill. 242, 13 N.E. (2d) 278, 115 A.L.R. 348; *People v. Smith* (1939), 36 Cal. App. (2d) 748, 92 P. (2d) 1039; *People v. Gardner* (1939), 255 App. Div. 683, 8 N.Y.S. (2d) 917.

"Involuntary manslaughter does not belong to that class of crimes that may be charged in the language of the statute. When the affidavit or indictment is based upon the commission of an act which is unlawful because it is negligent, the allegations must allege facts by which it is made to appear that the act was done wantonly or with reckless disregard for the safety of others, and it must further appear that such act was the proximate cause of the death. In *Potter v. State* (1904), 162 Ind. 213, 70 N.E. 129, 64 L.R.A. 942, 102 Am. St. Rep. 198, 1 Ann. Cas. 32, it was held to be necessary to a charge of manslaughter that the death of the decedent be made to

> appear the natural or necessary result of the unlawful act relied upon and that it was insufficient to charge that the killing occurred 'while' the defendant was doing the unlawful act. The charge is not aided by the allegation, by way of conclusion, that the act was done with wanton and reckless disregard for the safety of others, *Kimmell v. State* (1926), 198 Ind. 444, 154 N.E. 16. The rules stated above must be held equally applicable to the charge of reckless homicide."

Later on, in *Rogers v. State,* 227 Ind. 709, 715, 88 N.E. (2d) 755, 758, (1949), it was expressly stated that "[r]eckless homicide, under the statute [Burns IND. STAT. ANN., § 47-2001] . . . is a form of involuntary manslaughter. . . ." Several involuntary manslaughter cases were cited to support the holding that the commission of other crimes, such as driving under the influence of alcohol, could be alleged as constituting reckless disregard for the safety of another.

In *Ray v. State,* 233 Ind. 495, 120 N.E. (2d) 176, 121 N.E. (2d) 732, appellant had been convicted of involuntary manslaughter on a two count indictment charging involuntary manslaughter and reckless homicide. He then challenged the sufficiency of the involuntary manslaughter count for reasons stated by the court thus:

> "'The appellant contends that the reckless homicide statute upon which count two of the indictment is based is specific, includes all the elements necessary to prove the more general offense of involuntary manslaughter, and so only the reckless homicide statute is presently in effect. Since count one of the indictment (involuntary manslaughter) was based upon driving an automobile while under the influence of intoxicating liquor as the

proximate cause of death, and wholly fails to charge facts constituting the offense of reckless homicide, the appellant insists count one of the indictment was insufficient."

The Court answered that argument—without even suggesting that the reckless homicide statute does not, or may not, in fact, "include . . . all the elements necessary to prove the more general offense of involuntary manslaughter. . . ." The Court's answer was merely to quote Burns IND. STAT. ANN., § 47-2002,[28] apparently for that part of that statute which says: "Section 52, subsection (a), in creating the offense of reckless homicide, does not modify, amend or repeal any existing law, but is supplementary thereto. . . ."

The constitutionality of the mechanics, or the means, employed by the Legislature in creating this flexibility of punishment are not here in dispute. The Legislature could have merely changed the penalty provisions of the manslaughter statute to provide the judge or jury with the same range of penalty alternatives on a charge of manslaughter by vehicle as was provided to the jury in this case by the fact that petitioner was charged with reckless homicide in Count I and involuntary manslaughter in Count II. If that had been done in 1939, instead of the method chosen by the Legislature, the jury trying petitioner would have had exactly the same discretion it did have. So far as petitioner is concerned there is aboslutely no difference in the two methods.

The possibility that other accused persons charged only with involuntary manslaughter may not have the advantage

---

[28] Printed herein at p. 11, ante.

of alternative penalties accorded to petitioner by charging him in a two-count affidavit with two identical offenses obviously is no concern of petitioner.[29] And the fact remains that petitioner here went to trial, both on his first and his second trial, in exactly the same position as any other defendant who is accused of an offense for which alternative penalties are prescribed.

If petitioner had been charged in Indiana with felony-murder, as was *Green* in the District of Columbia, he could have been found guilty, like *Green*, of only one offense: First degree murder.[30] But in Indiana, unlike the District of Columbia, when a defendant allegedly murders by arson, the jury has the option, in any guilty verdict, of stating whether the punishment to be inflicted[31] should be death or life imprisonment.[32] In analogous principal, petitioner's situation was no different when he was tried on the two-

---

[29] Whether, as petitioner charges on page 16 of his petition, the method the Indiana Legislature chose to give petitioner's jury alternative penalties it could impose (for what he there concedes is "in reality the same offense") is unique is not only doubtful, but irrelevant. No research to discover whether this provision of Indiana's "uniform" act is also "uniform" in other states or unique to Indiana is deemed necessary for this brief. Instead of complaining of being "subjected in one trial to two counts," petitioner should thank the prosecutor for including the count charging reckless homicide. If the prosecutor had chosen to charge only the one count of involuntary manslaughter the petitioner could now well be serving a 2-21 year sentence instead of appealing a 1-5 year sentence.

[30] It is one of the strange quirks of the *Green* case that his first conviction of second degree murder was reversed by the Court of Appeals because the District Court had erroneously permitted the jury to return a verdict of second degree murder on evidence which would permit only verdicts of either guilty or not guilty of first degree murder. 95 U.S. App.D.C. 45, 218 F.2d 856.

[31] Burns IND. STAT. ANN., § 9-1819.

[32] Burns IND. STAT. ANN., § 10-3401.

count charge of the two identical offenses of reckless homicide and involuntary manslaughter.

If petitioner had been tried on a charge of felony-murder, found guilty with life imprisonment as the punishment, appealed, and granted a new trial because of an erroneous instruction, would it be held that he could not again be tried for felony-murder because of the possibility that the second jury, although properly instructed, might not only find him guilty of the same offense the first jury found him guilty of, but might assess the greater punishment of the death penalty?

This Court said no to that question in *Stroud v. United States,* 251 U.S. 15, even though Stroud was given the death penalty on the last trial.[33] *Stroud* was tried three times on a single count indictment charging first degree murder in a federal prison. Under the federal statute involved in that case, the jury was permitted, by the form of its verdict, to fix the punishment to be imposed by the court, which could be either life imprisonment or hanging. The first trial resulted in a sentence of death, reversed on Stroud's appeal. The second trial also resulted in a verdict of guilty of first degree murder but "without capital punishment." This was also reversed on Stroud's appeal and the third trial resulted in a third verdict of guilty and the sentence of death was imposed.

This Court, by Mr. Justice Day, said:

> "It is alleged that the last trial of the case had the effect to put the plaintiff in error twice in

[33] If he had been given a life sentence the question would have been moot—as it is in the case at bar—and would not have been considered.

jeopardy for the same offense in violation of the Fifth Amendment to the Constitution of the United States. From what has already been said it is apparent that the indictment was for murder in the first degree; a single count thereof fully described that offense. Each conviction was for the offense charged. It is true that upon the second trial the jury added 'without capital punishment' to its verdict, and sentence of life imprisonment was imposed. * * * The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder. *Fitzpatrick v. United States*, 178 U.S. 304, 307.

"The protection afforded by the Constitution is against a second trial for the same offense. *Ex parte Lange*, 18 Wall. 163. *Kepner v. United States*, 195 U.S. 100, and cases cited in the opinion. Each conviction was for murder as charged in the indictment which, as we have said, was murder in the first degree. In the last conviction the jury did not add the words 'without capital punishment' to the verdict, although the court in its charge particularly called the attention of the jury to this statutory provision. In such case the court could do no less than inflict the death penalty. Moreover, the conviction and sentence upon the former trials were reversed upon writs of error sued out by the plaintiff in error. The only thing the appellate court could do was to award a new trial on finding error in the proceeding, thus the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution. *Trono v. United States*, 199 U.S. 521, 533."[34]

---

[34] The fact that *Trono*, which was rejected as controlling precedent in *Green* (355 U.S. at 197) is cited here as authority does not in any way weaken the distinction between *Stroud* and *Green*. At the foot of page 195 of 355 U.S., as part of footnote 15 beginning on page 194, it

The mere fact that the one offense with two alternative penalties is stated in one statute and charged in one count, as in *Stroud* (as it would also be in any felony-murder case in Indiana), is entirely irrelevant so far as the analogy between *Stroud* and the case at bar is concerned. This is the "other side of the coin" seen in footnote 10, 355 U.S. at 190, which reads:

> "In substance the situation was the same as though Green had been charged with these different offenses in separate but alternative counts of the indictment. The constitutional issues at stake here should not turn on the fact that both offenses were charged to the jury under one count."

This brings the argument full circle to petitioner's basic premise that the jury's failure to return any verdict whatsoever on the involuntary manslaughter count in the first trial is a verdict of not guilty, by implication.[35] Whether such verdict is implied solely by the jury's silence on that count or by their silence coupled with their express verdict of guilty of the other count, he does not say. But in any event the claim that such a verdict must be inferred appears to be based solely on the authority of the Indiana cases cited by the Indiana Supreme Court in that part of its opinion printed at the foot of page 2 and the top of page 3 of the petition's appendix.[36] Those cases are all based on

---

was said: *"Stroud v. United States,* 251 U.S. 15, is clearly distinguishable [from *Trono*]. In that case a defendant was retried for first degree murder after he had successfully asked an appellate court to set aside a prior conviction for that same offense."

[35] Paragraph 5 of special plea of former jeopardy. Petition, p. 5.

[36] The last two sentences of the paragraph of the opinion which follows the citations are misprinted in the appendix. In 208 N.E.2d 685, 687, 6 Ind. Dec. 1, 2, those sentences read:

". . . In the leading case of *Weinzorpflin v. State, supra,* [7 Blackf. (Ind.) 186 (1844)] the doctrine of silence being equivalent to an ac-

the precedent of *Weinzorpflin v. State*, 7 Blackf. 186 (1844), in which a defendant, in an appeal from his first and only trial in which the jury had found him guilty on only one count of a three count indictment, contended he was entitled to a verdict on the other two counts. The holding of *Weinzorpflin* on this point was essentially the holding of this Court in *Green* to the effect of the jury's silence as to the defendant's guilt of the offenses charged but not mentioned in the verdict: It makes no difference; "the defendant has once been put in jeopardy . . . [and] can plead these proceedings in bar of a future prosecution. . . ."[37] Unlike *Green*, however, *Weinzorpflin* was not concerned (and had no reason to be concerned) with whether that jeopardy on the second and third counts could have been pleaded in a later trial after the setting aside of the guilty verdict on the defendant's motion. *Weinzorpflin* was concerned only with whether the defendant was adequately protected against a new prosecution while the guilty verdict stood. There was no question but that the guilty verdict protected defendant against another prosecution for the same offense charged in the count to which that verdict related. But the court said, on page 193 of 7 Blackford, ". . . we can not judicially know that the offenses charged in the three counts constituted but one transaction." Hence, the Court was not in the position of the federal court in *The United States v. Keen*, 1 McLean's R., 429, which "judicially knew that the five counts were for the same

---

quittal was promulgated with reference to the common law doctrine that a jury could not be dismissed until a verdict was returned. That case, however, distinguishes its facts from a situation where the court could judicially know that the multiple counts were merely different charges of the same offenses."

[37] Quotes from 7 Blackf. 194. The equivalent holding in *Green* is at p. 191 of 355 U.S.

offenses, varied so as to meet the proofs, and that consequently *a conviction on one count was a conviction on all,* and would bar a future prosecution for the same offense."[38] It is obvious, therefore, that the silence of a jury as to any one count of a multiple count indictment or affidavit can imply either a verdict of guilty or a verdict of not guilty depending on the logic of the particular case, and what the court in such case can judicially know about the identity or mutual exclusiveness of the two counts. And in the case at bar there is no logical reason for inferring that the jury's silence on the manslaughter count of the affidavit was a finding that he was not guilty of all the elements of involuntary manslaughter when, at the same time, the jury found him guilty of all those same elements—neither more nor less—in finding him guilty of reckless homicide. Even petitioner himself contends that a verdict of guilty of Count I and not guilty of Count II is an inconsistent verdict, yet maintains that Indiana precedent requires that silence be presumed to be "what is legally an acquittal."[39]

The Indiana Supreme Court did not refuse to concede, as contended by petitioner, that there is an abundance of Indiana authority which "holds that silence on a criminal charge [is] tantamount to acquittal."[40] As petitioner so inconsistently states, that Court did recognize that authority and returned to the logic of the *Weinzorpflin* case by holding:

> "Rather than treat the silence of the jury in the involuntary manslaughter count in this case as an acquittal, the better result would seem to be to hold

---

[38] The words quoted are from Weinzorpflin, 7 Blackf. at 192-3 (and not from *U. S. v. Keen, supra*) with emphasis added.

[39] Petition, page 16.

[40] Petition, pp. 15-16.

> that the reckless homicide verdict encompassed the elements of involuntary manslaughter, and that appellant was simply given the lesser penalty."[41]

And further:

> "Aside from the obvious fact that the Green case, *supra,* [355 U.S. 184] involved the application of federal law and federal standards, *there is the distinction concerning the character of the charges twice in issue.* The offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involuntary manslaughter. [Emphasis added.]
>
> "Since the elements of both counts are almost identical, it is recognized that a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter for constitutional reasons as would be the case when a conviction is had on a lesser included offense. See Burns' Ind. Stat. Anno. § 47-2002 (1952 Repl.)."[42]

The analogy of the case at bar to *Stroud* and its distinguishment from *Green* could be further belabored, but respondent believes the point has been made.

There is, of course, at least one other reason for not granting a writ on this petition: The holding of this Court in *Palko v. Connecticut, supra* [302 U.S. 319], conceded by petitioner to be "an obstacle."[43] Most of the petition for

---

[41] As quoted from pp. 3-4 of the Petition's Appendix; p. 3 of 6 Ind. Dec., p. 687 of 208 N.E.2d.

[42] As quoted from pp. 6-7 of the Petition's Appendix, p. 5 of 6 Ind. Dec., and pp. 688-89 of 208 N.E.2d.

[43] Petition, p. 21.

the writ (whether expressly so or not) is an argument for the overruling of *Palko*. Respondent has chosen not to join that argument at this time, preferring to concentrate on the more obvious arguments which make it clear that the question of whether the rule of *Palko* should continue to be the law of the land is not an issue in this case. While respondent cannot envision this case as the vehicle for "revisiting" *Palko*, the granting of a writ of certiorari in this case would, in respondent's understanding, amount to that—and no more.[44] In that event, if respondent understands certiorari practice, he may again urge in his brief on the merits, as reasons for affirming the State court judgment or as reasons for dismissing the writ as improvidently granted, any of the reasons stated herein why the writ should not be granted and, on the merits, any reason for the affirmance of the judgment below, whether or not it may have been mentioned in this brief. But because of the annotation to Rule 24, Rules of the Supreme Court of the United States as published in 28 U.S.C.A. construing *Wiener v. United States*, 357 U.S. 349, as holding that a contention not raised in opposition to petition would not be considered by this Court, respondent wishes to go on record at this time as relying on every reason stated in *Palko* as argument that this Court should not hold that the due process clause of the Fourteenth Amendment prohibits the double jeopardy which petitioner contends occurred in his case.

---

[44] Which is to say, the granting of the writ would not be the overruling of *Palko*, but merely the court's decision to consider whether it should overrule *Palko*.

CONCLUSION

The petitioner has attempted, but failed, to show by his petition that his second trial violated the rule against double jeopardy enunciated in *Green v. United States, supra* [355 U.S. 184] and that this Court should now "revisit" *Palko v. Connecticut, supra* [302 U.S. 319], overrule it, and extend the Sixth Amendment's double jeopardy prohibition to State criminal prosecutions. His petition should be denied not only because he has thus failed to show that he was ever in double jeopardy (even by the rule of *Green*), but also because the question of whether he was ever tried a second time for the same offense was mooted by the second verdict.

Respectfully submitted,

JOHN J. DILLON
Attorney General,
State of Indiana

CHARLES S. WHITE
Chief Counsel—Staff
Attorneys for Respondent.

Office of the Attorney General
219 State House
Indianapolis, Indiana